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In the

Supreme Court of The United States

October Term, 1970

No. 830

MAYLAND L. CLARK, *Petitioner*

vs.

ALBERT GULESIAN, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

WILLIAM R. DAVIS, of
RISCASSI, DAVIS & LINNON
75 Lafayette Street
Hartford, Connecticut 06106

and

ERROL K. PAINE, of
PAINE, COHEN & LYNCH
15 Columbia Street
Bangor, Maine 04401

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The Petitioner, Mayland L. Clark, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 15, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Maine.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on July 15, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether it is an unconstitutional denial of due process and the equal protection of the law for a malpractice statute of limitations to run from the date of the wrong, rather than the date of discovery, where the injured party is unaware and cannot be expected to be aware of the injuries prior to the running of the statutory period.

STATUTORY PROVISIONS INVOLVED

Maine Revised Statutes Annotated, Title 14, § 753. Two years

> Actions for assault and battery, and for false imprisonment, slander, libel and malpractice of physicians and all others engaged in the healing art shall be commenced within 2 years after the cause of action accrues.

STATEMENT OF THE CASE

On August 4, 1952, Petitioner was running along a

brook with his mother, his brother and two sisters, when he fell over a log. Petitioner was taken to the hospital and examined by the Respondent. An operation was performed at which time it was discovered that Petitioner had punctured his jejunum. The puncture was repaired and the incision closed except for a drain, which was subsequently removed. Although healing was slow, it appeared complete, and Petitioner was finally discharged later in the fall of 1952.

Petitioner never recovered his health after the operation. He lacked ambition and was sick most of the time. Finally, on January 13, 1969, Petitioner became so sick that he could not eat; he weighed approximately 80 pounds. At this time, he was admitted to the hospital for a period of approximately ten weeks in order to build up his strength. Thereafter, he was discharged for one month and then brought back for an exploratory operation. During the course of this operation, which was the second time Petitioner had ever been operated on, it was discovered that Plaintiff had a towel 56 by 34 centimeters in his abdomen.

Because of the towel in Plaintiff's abdomen, his digestive system did not function properly. His growth was stunted as a result of nutritional deficiencies. Petitioner is only five feet two inches tall, while his entire family is substantially taller. After the towel was removed, Petitioner grew one inch, although he was twenty-seven years of age.

At the time of the accident and the original operation, Petitioner was ten years old. The towel was discovered approximately seventeen years later, at which time Petitioner was twenty-seven years old. During the intervening period, Petitioner was examined by other doctors, but the existence of the towel could not be discovered because it was not revealed by x-ray examination.

Petitioner commenced suit in the United States District Court for the District of Maine on the basis of diver-

sity of citizenship and amount in controversy to recover for the damage caused by Respondent's negligent failure to discover and remove the towel. Respondent asserted as an affirmative defense that any remedy to which Petitioner might be entitled was barred by the statute of limitations governing malpractice actions. Respondent moved to dismiss the complaint for failure to state a cause of action. A stipulation admitting the Petitioner's age and the date of the accident was filed by the parties, and the District Court, treating the Respondent's motion to dismiss as a motion for summary judgment, dismissed the Petitioner's complaint. Petitioner appealed to the Court of Appeals for the First Circuit which affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

(1) *There is a substantial question about the constitutionality of the "time of the act" rule.*

Due Process

The phrase "due process" is broad, untechnical, and perhaps incapable of precise definition. It embodies notions of "fair play" and "principles of liberty and justice fundamental to a scheme of ordered liberty." See, *e.g.*, *Palko v. Connecticut*, 302 U. S. 319 (1937); *Snyder v. Massachusetts*, 291 U. S. 97 (1934); *Hurtado v. California*, 110 U. S. 516 (1883). As stated by Justice Frankfurter, due process includes those procedures required for the "protection of ultimate decency in a civilized society." *Adamson v. California*, 332 U. S. 46, 61 (1947) (concurring opinion).

The absence of definitional precision is perhaps the best evidence that the concept of due process itself is not static or frozen into a temporal or historical contect. The very essence of "due process" is that it reflects the prevailing moral commandments of the day rather than the fixed jural precepts of the past. It is not poured in the mold of

the common counts, but is rooted in the principle of applying a contemporary sense of fairness and a "standard for judgment in the progressive evolution of the institutions of a free society." *Malenski v. New York*, 324 U. S. 401, 414 (1945).

A procedural rule which requires an individual to bring a cause of action within a period during which he does not know, and through the exercise of reasonable care could not know, that he had a cause of action constitutes a denial of due process. The liquidation of a cause of action for an "inherently unknowable" harm before one discovers that it exists is an elusive and illusory remedy and one which most courts today find repugnant to our sense of justice and fairness. See, *e.g.*, *Johnson v. St. Patrick's Hosp.*, 148 Mont. 125, 417 P. 2d 469 (1966); *Ayers v. Morgan*, 397 Pa. 282, 154 A. 2d 788 (1959); *Johnson v. Caldwell*, 371 Mich. 368, 123 N. W. 2d 785 (1963); *Fernandi v. Strully*, 35 N. J. 434, 173 A. 2d 277 (1961).

Due Process is not necessarily determined by taking a balance sheet accounting of the position held by the various jurisdictions. Nevertheless, our courts often look to corresponding federal and state court practices to gain a consensus of contemporary standards and prevailng concepts of fairness. See, *e.g.*, In re *Oliver*, 333 U. S. 257, 267-68 (1948); *Wolf v. Colorado*, 338 U. S. 25 (1949); *Snyder v. Massachusetts*, 291 U. S. 97 (1934); *Powell v. Alabama*, 287 U. S. 45, 70 (1932); *Solesbee v. Balkcom*, 339 U. S. 9, 14 (1950) (dissenting opinion, Frankfurter, J.).

In this regard, it is interesting to note that one court, when confronted with the issue of deciding the time at which the period of limitations started to run in medical malpractice cases involving "foreign objects" reviewed all of the state and federal rulings in similar cases. The court found that only 16 states still adhered to the "time of the negligent act" rule and that in many of those states the rule had been engrafted with many exceptions in order to alle-

viate the obvious injustice imposed by the rule. See *Berry v. Branner*, 245 Ore. 307, 421 P. 2d 996 (1966). And for more recent cases rejecting the "time of the act" rule see *Flanagan v. Mount Eden Gen. Hosp.*, 24 N. Y. 22 427, 301 N. Y. S. 2d 23, 248 N.E.D. 871 (1969); *Burke v. Washington Hosp. Ctr.*, 293 F. Supp. 1328 (D.D.C. 1968); *Ruth v. Dight*, 453 P. 2d 631 (Wash. 1969).

Most of the cases cited in the *Berry* decision, *supra* indicate that the "time of the act" rule is "illogical", "unfair", "unjust", "patently unrealistic", "completely unreasonable", and amounts to a "mockery of the law". While these courts in refusing to adhere to the "time of the negligent" act rule did not find it necessary to place their rulings within a constitutional text, it seems clear that the terminology employed in rejecting the ancient and outmoded rule embraces the very essence of due process.

The constitutional issue presented by cases similar to the instant one, however, has not gone unnoticed. In *Ayers v. Morgan*, 397 Pa. 282, 154 A. J/2d/J/ 788 (1959), Justice McBride, in his concurring opinion, reasoned that since the Pennsylvania Constitution provided that "all courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law; a judician interpretation that the statute of limitations had expired prior to discovery of the foreign object would render the statute unconstitutional.

> Statutes of limitations must be read in the light of this provision for the running of time is not the only test of validity of such statutes. They are desirable in that they prevent oppression by forbidding plaintiffs to litigate stale claims and thus compel defense at a time when such defense is no longer practicable and sometimes even impossible. Nevertheless, the restrictions imposed may not be so arbitrary as to preclude a reasonable opportunity for one who has been harmed to make his

> claim. If the legislature were permitted absolute discretion it would not be merely regulating the remedy but would be abolishing it. . . . This may not be done either in a statute which operates retrospectively or one which operates prospectively for in either event it would amount to a *denial of justice*. The legislature could not have intended such a result. Although courts will not inquire into the wisdom of a statute, nevertheless they do have power to declare a statute unconstitutional as applied to a given case, or *alternatively, to interpret the statute so as to include an essential requirement which would make its applicational constitutional*. I believe this case requires us to adopt this alternative course. [Emphasis added].

See also *Heck v. Schupp*, 394 Ill. 296, 68 N. E. 2d 464 (1946); *Daily v. Parker*, 61 F. Supp. 701 (Ill. 1945).

The right of every individual to have his day in court to seek redress for harm caused by another is the very keystone of our jurisprudence. If the door to our courts is to be closed, it cannot be slammed in an arbitrary or unreasonable manner. Moreover, the Fourteenth Amendment will not be satisfied by a court simply invoking the state's common-law policy. *Shelly v. Kraemer*, 334 U. S. 1 (1948); *American Fed. of Labor v. Swing*, 312 U. S. 321 (1940); *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

Depriving a man of a legal remedy before he knows, or reasonably can be expected to know, that he has a cause of action "cannot be reconciled with the traditional purposes of the statute of limitations." See *Urie v. Thompson*, 337 U. S. 168 (1948).

It is clear that it is arbitrary and unreasonable to maintain that the need for repose would be violated unless the period of limitations runs from the date of the negligent

act against a party who does not know and reasonably cannot know that he has suffered a wrong. The mark of our jurisprudence is that it responds to the "felt necessities of the times," and neither our courts nor legislatures can offer us the dead hand of the past in responding to the realities of societal practice, progress and conscience. *Cf.*, Holmes, Jr., in *Missouri v. Holland*, 252 U. S. 416, 433 (1920). The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Equal Protection

The construction given to the medical malpractice statute of limitation by the Maine Supreme Judicial Court constitutes state action, which must be a reasonable exercise of the state's police power. *Shelly v. Kraemer*, 334 U. S. 1 (1948); *Twining v. New Jersey*, 211 U. S. 78 (1908).

In the instant case, Petitioner falls within that group of persons who have a cause of action for which the courts refuse a remedy, or provide an illusory one at best. The Maine Supreme Judicial Court has by judicial interpretation classified him within the same category as those persons who have been dilatory in seeking redress for their injuries. Perhaps in a broader sense, it can be argued that Petitioner is actually *excluded* (by virtue of his ignorance of an injury) from the class of the general public that has access to our courts for redress of their injuries. But whether the Petitioner is said to be included in the same class of persons that has knowledge of a claim or excluded from the class of the entire population that has access to the courts, the end result remains the same: the classification is unreasonable and arbitrary and constitutes unfair discrimination against him.

The distinction between a Plaintiff who knew or reasonably should have known of an injury and failed to seek redress and the Plaintiff who did not know and could not

reasonably have been expected to know of an injury is too obvious to demand elaboration. To treat these two different classes of people in the same manner does not result in similar treatment for persons similarly situated. *Cf. Hartford Steam Boiler Inspection and Ins. Co. v. Harrison*, 301 U. S. 459 (1936). As suggested above, it is no less discriminatory for the state to place individuals on an artificial parity when their circumstances and opportunities are inherently unequal.

The law often indulges in presumptions, but the presumptions must rest upon a foundation of reasonability in logic or experience. It is an exercise in causitry, however, to conclude that all individuals are given a reasonable opportunity to litigate their claims when, because of the very nature of the harm suffered, one class does not have any knowledge that a wrong has been commited. A right so fundamental as the right to a day in court cannot be extinguished by such a facile application of the label of equal opportunity. It is unequal and unreasonable treatment because this general classification ignores the realities of contemporary problems and fastens onto a barnacled rule of construction that sits on age instead of analysis.

The majority of courts today have rejected the rule that individuals who suffer inherently unknowable harms at the hands of physicians must be treated in the same manner as those who have slept on their right to redress. Although the rejection of the "time-of-the-act" rule is not expressed in terms of equal protection of the law, nevertheless, the courts apparently recognize that similar treatment of persons dissimilarly situated is unreasonable and violates all notions of fairness and justice.

As the Supreme Court of Delaware stated:

> To say that the Plaintiff has two years after the 'claimed' injury within which to maintain an action, and, at the same time, to say that the injury must be 'claimed' before she has, or can reason-

> ably be expected to have, knowledge of any wrong inflicted upon her, is contrary to *reason* and *justice*. It is *unreasonable*, we think, to assume that the General Assembly intended to grant a remedy for a wrong but to bar the remedy before the wrong was physically ascertainable by due diligence. To ascribe to the General Assembly any such *unjust* intent . . . seems to us *completely unreasonable*. *Layton v. Allen*, 246 A. 2d. 794 (Del. 1968) [Emphasis added].

The Supreme Court of Oregon held that taking away a cause of action under circumstances similar to the case at bar made a *mockery of justice*. *Berry v. Branner*, 245 Ore. 307, 421 P. 2d 996 (1966). See also *Fernandi v. Strully*, 35 N. J. 434, 173 A. 2d 277 (1961). (Justice cries out that she fairly be afforded a day in Court). And see *Urie v. Thompson*, 337 U. S. 168 (1948); *Johnson v. St. Patrick's Hosp.*, 148 Mont. 125, 417 P. 2d 469 (1966).

From the foregoing, it can be seen that the Courts recognize that it is unreasonable and unjust to deprive a man of his cause of action before he has knowledge of its existence. And as this Court has said such a course of conduct cannot be reconciled with traditional notions of the purposes of limitations. *Urie v. Thompson*, 337 U. S. 168 (1948).

These observations reflect the reasoned application of today's law with the art of medicine. The contrary view is merely "blind imitation of the past." While it is not a denial of equal protection to deprive the tardy of their remedy, it is arbitrary and unreasonable to continue to apply an ancient rule to a state of acts never envisioned.

(2) *Many people are affected by the issue presented by the instant case.*

The state courts disagree as to when a cause of action accrues in the "foreign objects" cases. A review of the au-

thorities indicates that approximately 34 states adopt the "time of discovery" rule, and that only 16 adopt the "time of the act" rule. See *Berry v. Branner*, 245 Ore. 307, 421 P. 2d 996 (1966); *Flanagan v. Mt. Eden Gen. Hosp.*, 24 N. Y. 2d 427, 301 N.Y.S. 2d 23, 248 N. E. 2d 871 (1969).

As the above cases illustrate, the problem of the accrual of a cause of action in a foreign object case is not isolated. If the "time of the act" rule were held unconstitutional it would affect innumerable victims in the 16 states still adhering to "time of the act" rule.

(3) *The class of persons injured by the application of the "time of the act" rule are least able to afford the loss and therefore most in need of review of this rule.*

The victims of "foreign objects" malpractice as a class are frequently left with partial or permanent disability. This occurs at a time when there are frequently substantial bills for curative medical treatment. The economic loss which is inflicted on the victim and his family is such that this court would be warranted in granting the writ on behalf of the entire class.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,
WILLIAM R. DAVIS, of
RISCASSI, DAVIS & LINNON
75 Lafayette Street
Hartford, Connecticut 06106

APPENDIX

OPINION

ALDRICH, *Chief Judge.* This is a diversity action for malpractice. In 1952, when the plaintiff was ten years old, he was given emrgency surgical treatment by the defendant physician. Allegedly his health was poor thereafter, and in 1969 he underwent further surgery. Allegedly at this time a towel was discovered in his abdomen which had been left there during the original operation and which had continuously interfered with his digestive system, and consequently caused his poor health. Defendant pleaded the Maine statute of limitations. Concededly this statute applies, and, concededly, under it, even under such circumstances as this, the cause of action accrues at the time of the wrongful act. *Tantish v. Szendey*, 1962, 158 Me. 228; *cf. Tessier v. United States*, 1 Cir., 1959, 269 F. 2d 305, 309. The district court dismissed the complaint, and plaintiff appeals.

Plaintiff's first argument on this appeal is that the Maine statute, as interpreted and applied in *Tantish*, is unconstitutional as a denial of equal protection and due process. For this novel contention he cites no direct authority of any sort. While state courts disagree in their approach as to when, under circumstances such as these, the cause of action accrues, defendant points out that no majority opinion has based its decision on constitutional grounds. For a recent review of authorities see *Flanagan v. Mount Eden General Hospital*, 1969, 24 N. Y. 2d 427 (adopting a contrary rule). As we pointed out in *Tessier*, ante, at 310, this is a policy decision. The rights are not one-sided. Unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of stale claims, however free from fault the claimant's delay may be. Such a conclusion does not deprive the plaintiff of any constitutional right to fair or equal treatment.

The plaintiff's alternative claim is that the statute has not run because there has been a continuing injury. The asserted continuing duty to remove a foreign object is inconsistent with the rule established by *Tantish*, since it would avoid the bar of the statute of limitations in every such case. We must therefore reject a continuing negligence theory which is based solely on the initial wrongful act. In fact, the Maine court, in surveying the law of other states, explicitly rejected this approach, although the issue had not been raised by the plaintiff there. *Tantish*, ante, at 236.

Finally, the plaintiff can have no claim for continuing negligence apart from the constructive one of a duty based upon the original conduct. There has been no separate act of malpractice in connection with subsequent treatment. In fact the plaintiff has not even seen the defendant since 1957.

In this case we inaugurate the practice established by our new Local Rule 6, paragraph 2d, which, in turn, is patterned upon the practice in some other circuits, notably the Fifth. Where we find the issues to be manifestly simple and clear, and the parties' legal citations, supplemented by our own research, fully dispositive of those issues, and the members of the court unanimously conclude that no useful purpose could be served by oral argument, oral argument will be dispensed with. We find this to be such a case.

The judgment of the district court is affirmed.

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was submitted to the Court.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
DANA H. GALLUP, *Clerk*
By: /s/ Francis P. Scigliano
Chief Deputy Clerk